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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. STEVE GUTIERREZ REYES, Defendant and Appellant.	G049409 (Super. Ct. No. M13182) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John L. Flynn, Judge. Reversed and remanded.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Steve Gutierrez Reyes was committed to the Department of State Hospitals (DSH) indefinitely after a jury found he qualified as a sexually violent predator (SVP) under the Sexually Violent Predator Act (SVPA). (Welf. & Inst. Code, §6600 et seq.)[1] He contends amendments to the SVPA made after the decision in *People v. McKee* (2010) 47 Cal.4th 1172 violate due process and deny SVP's equal protection of the law, because even if an SVP committee is able to demonstrate he is no longer mentally ill and no longer dangerous, the committee cannot obtain release from custody until he thereafter serves a year in an outpatient setting, unlike similarly situated mentally disordered offenders or individuals committed after having been found not guilty by reason of insanity.

He also claims his commitment must be set aside because the trial court erred in admitting a voluminous amount of inadmissible hearsay evidence, mistakenly believing it was admissible pursuant to section 6600, subdivision (a)(3) (hereafter section 6600(a)(3)). Additionally, he claims he was denied equal protection of the law when the prosecutor called him to the witness stand in the prosecution's case-in-chief. The equal protection claim is based on the fact that one found not guilty by reason of insanity (an NGI) and who is subject to a proceeding to extend a commitment after the individual has been committed for the maximum term provided in Penal Code section 1026.1, subdivision (b), retains the right not to be called as a witness. (Pen. Code, § 1026.5, subd. (b)(7) [committee facing extension of commitment is "entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings"]; *Hudec v. Superior Court* (2015) 60 Cal.4th 815, 818 ["a person facing extended commitment has the right to refuse to testify"].)

We find the trial court erred in admitting into evidence a substantial amount of inadmissible hearsay and will reverse the judgment committing defendant as an SVP.

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[1] All undesignated statutory references are to the Welfare and Institutions Code unless otherwise stated.

The remaining issues may be raised on remand.

I

FACTS

On May 26, 2010, the Orange County District Attorney filed a petition to have defendant indefinitely committed to a state hospital as an SVP pursuant to section 6600. The prosecutor called defendant as her first witness at trial.

A. *Defendant's Testimony*

At the time of trial in November 2013, defendant was 58 years old. He came to the United States with his four brothers when he was 19 years old, in 1974. Defendant did not go to school in the United States and only finished the second grade in the Philippines.

In the Philippines he sold food as a sidewalk vendor and worked as a meat cutter in a slaughterhouse. He also was a soldier in the army. In the United States, he picked asparagus for a short period of time and worked as a janitor in a hospital.

Defendant testified he did not remember raping Julie M. on May 29, 1981. When asked if he was convicted of a crime against Julie M., defendant said he did not know. He did deny having raped Julie M., and he remembers he went to prison in 1981. He added that he did nothing wrong. When asked about his interaction with Julie M., defendant said he did not know what the prosecutor was talking about.

Defendant did not remember what occurred on June 8, 1982, either. When asked if he remembered meeting a 24-year-old woman named Shirley M. that night, defendant said he did not remember anything—just that he was locked up and did his time. He denied doing anything to anyone with bad intentions. When asked if he forced her to have sex with him, defendant said, "I don't know anything about what you're saying." When specifically asked whether he walked her down into a ditch and forced her to have sex, defendant responded, "I did not do anything to her. How can I do the

things you mentioned when I'm inside my car?" He said he did not remember if Shirley M. had been in his car. At one point, defendant said, "I don't want to talk about it. I'm tired of talking about that. It is 32 years of talking about it, talking about the same old sh…, the same old sh…."

Defendant admitted having children, but denied knowing whether E. is their mother, and denied knowing E. He said he is not married. He eventually stated he did not have any children anymore. When asked if he forced E. to have sex with him when released from prison in 1990, defendant said, all the district attorney wants to talk about is sex and that he was "sick and tired of sex" and did not want to hear the word. Eventually he denied forcing E. to have sex with him.

The prosecutor asked defendant who M. is. Defendant said he did not know. When asked if she is one of his daughters, defendant said he already said he does not have any children. He gave the same answer when asked who J. is. He said he did not know whether he rubbed M.'s buttocks and vagina with his hand and said he did not know what the prosecutor was saying when she inquired whether he had asked J. if she liked sex.

Defendant remembered being arrested for burglary in 1992, but denied stealing anything and said he did not know what had happened. He said he went to the hotel to rent a room. He denied entering any hotel room and stealing from people staying in the hotel.

The prosecutor asked defendant about his time in prison. He denied receiving a number of rule violations while in prison. Defendant refused to answer whether he received a rule violation in 1984. When asked whether he got into a fight with a cellmate in 1985, defendant responded, "That's confidential. I can't answer that one." "I can't answer that one," was defendant's response to other questions about specific rule violations. When asked about a September 17, 1987 violation, defendant said, "I don't know about that." He denied threatening staff and disobeying an order on

February 28, 1988. Defendant admitted he twice refused to sign parole papers. He did admit receiving a rule violation in September 2001, for putting up a curtain in his cell. He also admitted receiving rule violations for refusing to accept a cellmate on five occasions. Defendant further admitted he received rule violations for failing to provide a urine sample on a number of occasions, and rule violations for refusing to change cells on three occasions. He was disciplined multiple times while in the Orange County jail as well.

B. *Expert Testimony*

Donald J. Viglione, Jr., is a psychologist on the SVP evaluator panel. DSH asked Viglione to conduct an evaluation of defendant in 2010. Viglione did not conduct a face-to-face interview with defendant. He said he attempted to, but was told by staff that defendant refused the interview. In 2011, Viglione again attempted to interview defendant for an update of the earlier evaluation. When they met, defendant refused to cooperate and said he did not want to be there. This conduct was duplicated in 2012, when Viglione again sought to update his evaluation. Without an interview with defendant, Viglione based his evaluation on documentation from other sources.

In making an evaluation of a prospective SVP, the first criteria is to determine whether an individual has the requisite qualifying convictions. Viglione reviewed reports and other documents, including a probation report, an appellate court opinion and other documentation concerning an offense that occurred on May 29, 1981. According to his review of the documentation, Julie M., who was 13 years old at the time, was walking on Pacific Coast Highway when defendant drove up next to her and twice asked her to get into his car. She was afraid, but acquiesced the second time and got in. Defendant told Julie M. she was all his now. He drove her into a vacant lot, had her smoke marijuana, fondled her, forced her to masturbate him, orally copulated her, had sexual intercourse with her, and inserted his fingers into her vagina. Julie M.'s attempts

to escape were unsuccessful. Defendant threatened to hurt her. At some point during the incident, defendant asked Julie M. to be his girlfriend. She gave defendant her telephone number in an effort to have him captured. The next day, defendant dropped Julie M. off near her home. He telephoned her each of the next two days. On the second day, they set up a meeting. Defendant was apprehended when he showed up at the designated meeting place.

As a result of the incident with Julie M., defendant was convicted of committing a lewd act on a person under the age of 14 (Pen. Code, § 288, subd. (a)) and inducing a minor to use marijuana (Health & Saf. Code, § 11361, subd. (a)). The conviction for committing the lewd act on Julie M. meets the criteria for qualifying convictions.

Other documentation showed defendant suffered a second qualifying conviction on June 8, 1982. This conviction involved an incident where the victim was Shirley M. While defendant was out of custody awaiting trial in the Julie M. matter, he was again in his car in Orange County when 24-year-old Julie M. walked by. He talked her into getting into the car. When she said she did not want to be rude, defendant said he would drive her to a girlfriend's house and sped away. He did not take her to her girlfriend's house. Shirley M. attempted to escape, but defendant grabbed her hair. The car hit something and came to a stop in a dead end. Defendant dragged Shirley M. to a ditch about 50 or 60 feet away and raped her three times. They fell asleep in the car after defendant raped her a fourth time. Police found them just after midnight. Defendant was thereafter convicted of rape based on this incident. Viglione said this offense also meets the standard for a qualifying offense under the SVPA.

According to Viglione, documentation showed defendant was paroled in 1990, and moved in with his common law wife, E. Five days later, when he attempted to force her to have sex, she refused and he hit her on the back of her head. A report stated that same day defendant touched his daughter's buttocks in a manner she considered

sexual. The report stated E. saw defendant rub the genital area of his daughter. There was also a report that his 17-year-old daughter said defendant asked he if she wanted some "dick." Defendant was taken back into custody just 18 days after having been paroled. He denied the accusations.

Defendant was released again in 1991 and ordered not to contact his daughters without his parole officer's consent. Yet six or seven months after his release, one of his daughters reported he threatened to kill her if she continued to see her boyfriend. Defendant's parole was again revoked. In 1992, documentation showed defendant was convicted of a number of burglaries involving a motel and he was sentenced to state prison.

Viglione said that in addition to looking at an individual's criminal record, he also looks at prison records to determine the individual's institutional adjustment. Prison records showed defendant was found to have not respected the rights of others in 1987, disobeyed orders on multiple occasions, threatened staff in 1988, made a racial slur to staff in 1989, refused to sign documents in 1992, altered his cell by putting up curtains limiting visual inspections in 2001, fought with a cellmate in 2004, refused to accept a cellmate in 2004, refused to move to a different cell in 2005, refused to be handcuffed in 2005, again refused to move to a different cell in 2006, talked with general population inmates while in a behavior modification unit in 2007, refused to provide a urine sample on four occasions, refused a cellmate in 2008, hindered inspection by hanging a torn sheet in 2009, and refused to sign a document. Viglione characterized defendant's conduct in prison as consistently "irritable and uncooperative, if not defiant" but not violent.

Viglione also reviewed defendant's history of substance abuse, because it relates to whether an individual has full control over himself. He said individuals sometimes use substances to get sexually excited. He noted defendant claimed to have been drunk the night of the Julie M. incident, and he forced her to smoke marijuana.

In connection with the second prong required to find one to be an SVP—a mental disorder that predisposes the individual to commit criminal sexual acts—Viglione reviewed defendant's psychiatric history. Viglione said the SVPA requires a condition that predisposes the individual to criminal sexual acts and interferes with the individual's emotional and volitional control to the extent he poses a danger or threat to the community. The records indicate defendant has poor impulse control and poor coping skills.

Viglione used the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) and diagnosed defendant with a sexual disorder: paraphilia, not otherwise specified. He stated the disorder predisposes defendant to commit criminal sexual acts. He said the diagnosis is supported by defendant's crimes against Julie M. and Shirley M. Indeed, the fact that he raped Shirley M. while out of bail pending trial for the crimes against Julie M. demonstrated defendant's lack of control, as did his acts against E. and their daughters.

For purposes of determining the likelihood of defendant reoffending, Viglione consulted two actuarial devices, Static-99-R and Static-2002-R. Defendant's score on the Static-99-R indicated he had a high risk of reoffending, which Viglione calculated as a 42 percent chance of reoffending within 10 years. Defendant's score on the Static-2002-R put him in the moderate risk group with a 32 percent likelihood of reoffending. Viglione opined defendant was likely to commit a violent predatory offense if released.

Like Viglione, Craig Teofilo is a psychologist on the DSH's SVP evaluator panel. Teofilo evaluated defendant in 2012. He attempted to interview defendant in May 2012, but defendant declined to be interviewed. Teofilo's 2012 report was based solely on records. Defendant agreed to be interviewed for Teofilo's 2012 addendum to his report. Teofilo said defendant's offenses against Julie M. and Shirley M. qualify as the requisite sexually violent offenses.

Teofilo also said defendant has a personality disorder, not otherwise specified. This diagnosis is given to one who has a personality disorder, but who does not "meet the full criteria for any one disorder," and has "traits and features of multiple disorders." His character traits include narcissism and an antisocial personality. According to Teofilo, the disorder predisposes defendant to commit sex offenses.

Like Viglione, Teofilo used the Static-99-R test to assess defendant's sexual recidivism. He also used the SVR-20 test. The Static-99-R results placed defendant in the high risk group to reoffend should he be released. However, after considering all results, Teofilo concluded defendant presented a medium risk of reoffending if released. In Teofilo's opinion, defendant is a SVP.

C. *Documentary Evidence Containing Hearsay*

A number of the exhibits admitted at trial are set forth below. Exhibit 1 consisted of 35 pages Laguna Beach police reports from 1992, having to do with burglaries at a hotel in that city. Defendant was the named suspect. The police report made no reference to defendant's conviction for the predicate sex offenses involving Julie M. and Shirley M. in the early 1980s, or the circumstances of those incidents.

Exhibit 2 was Viglione's 21-page May 17, 2010 evaluation report of defendant. It listed the documents Viglione reviewed in preparing the report. It also stated his conclusion that defendant was convicted of sexually violent offenses against more than one victim and that defendant has a mental disorder that predisposes him to commit sex crimes. Additionally, the report quotes from the probation report in the Julie M. matter. Not only did the quote refer to statements by Julie M., it also quoted the probation officer's conclusion that defendant lacked remorse and did not appreciate the magnitude of his actions and the detrimental effect they had on Julie M. The report also set forth Viglione's analysis under subheadings, including inter alia, defendant's psychological/developmental history, educational history, employment and financial

support history, relationship history, psychosexual history, criminal history (which included a number of nonsexual offenses), institutional adjustment history (which included incidents of defendant's nonsexual noncompliant behavior in prison), substance abuse history, medical history, psychiatric history, future plans, mental disorder diagnosis, actuarial tools estimation of risk, general social rejection/loneliness, and poor cognitive problem solving.

Exhibit 3 was Viglione's July 29, 2011 updated evaluation. This report contained details of Viglione's unsuccessful attempt to interview defendant due to defendant's unwillingness or inability to cooperate in the interview process, in addition to Viglione's reasoning in concluding defendant qualified as an SVP. Exhibit 4 was Viglione's June 29, 2012 updated report. It too detailed defendant's refusal to be interviewed, as well as Viglione's reasons for concluding defendant still qualified as an SVP. Exhibit 5 was Viglione's November 5, 2012 addendum to his prior reports. This report detailed Viglione's review of defendant's medical records from prison and jail.

Exhibit 6 consisted of the complaint, information, sentencing minute order, and abstract of judgment in the Julie M. matter, as well as the abstract of judgment in the Shirley M. matter. Exhibit 7 was the probation report from the Julie M. matter. The report detailed the underlying offense, but also contained a discussion of defendant's prior criminal record, social history, aggravating factors, and the probation officer's conclusion that there were no mitigating factors in that case. Exhibit 8 was our opinion in defendant's appeal from his convictions in the Julie M. matter.

Exhibit 9 consisted of more than 25 pages of police reports on the Shirley M. matter. Exhibit 11 was a parole charge sheet. It contained allegations that defendant had changed his residence without permission, was involved in a sexual battery with his daughter, had access to firearms, ammunition, and a knife. The charge sheet contained the parole officer's reasons for recommending a maximum period of confinement. Exhibit 13 was a report to the board of prison terms concerning defendant's 1991 parole

violation based on failure to register as a sex offender and his contact with his wife and daughter.

Exhibit 15 was Teofilo's May 16, 2012 section 6600 evaluation of defendant. It too detailed defendant's refusal to be interviewed, as well as the documents reviewed by Teofilo and Teofilo's findings and the bases for his findings, including defendant's nonsexual criminal record and defendant's test scores on tests designed to measure his risk of reoffending. Exhibit 16 was Teofilo's September 24, 2012 addendum report that reiterated Teofilo's conclusion that defendant is an SVP. Exhibit 17 was Teofilo's February 25, 2013 updated report. This report also stated defendant refused to participate in a clinical interview. The updated report noted the documents reviewed by Teofilo, and contained quotes from probation reports.

Exhibit 18 was the information, abstract of judgment, and a minute order from the Shirley M. matter. Exhibit 19 was a probation report in the 1992 burglary matter.

Exhibit 20 was a 1990 parole summary of revocation hearing and decision. E. and the two daughters testified at the hearing. The document stated there was good cause to find defendant changed his residence without approval, committed a sexual battery and battery, and that he had access to firearms, ammunition, and knives.

Exhibit 21 was a 1991 summary of revocation hearing and decision. It stated good cause existed to revoke defendant's parole for threatening a witness and failing to register as a sex offender.

Finally, exhibit 24 was the police report made in connection with E.'s report of defendant having attempted to force her to have sex with him, and his having sexually touched their daughter on another day.

D. *Julie M.'s Testimony*

Julie M. testified about the May 29, 1981 incident when she was 13 years old. She was walking home from a girlfriend's house when defendant drove up next to her and asked her if she needed a ride. She said she did not, but defendant told her to get in the car. She again said no and he again told her to get in the car. She was afraid, but got into the car. He drove away at a high rate of speed and she asked to get out of the car. Defendant told her, "You're mine."

Defendant drove behind what Julie M. believed was a closed restaurant. He asked her how old she was and Julie M. said she was 13 years old. He asked her if she smoked "pot," and although she did not, Julie M. said "yes." She believes they smoked three marijuana cigarettes together. Defendant undressed her and forced her to orally copulate him. He then orally copulated and raped her. When she tried to get out of the car, he hit her. At the end of the seven-hour ordeal, defendant asked for Julie M.'s telephone number after he told her he knew she was "a young girl" and it was her first time. She gave it to him "to survive." He then told her, "Get out of the car." She then ran across the street and called the police.

E. *Defense Evidence*

Hy Malinek is a clinical psychologist on the DSH's SVP evaluator panel. He has qualified as an expert witness on over 100 occasions and usually testifies for the prosecution. Malinek was retained by defendant's counsel to evaluate defendant. Malinek found defendant does not meet the criteria necessary to conclude he is predisposed to reoffend in a sexually violent manner. According to Malinek, defendant's conduct is more consistent "with a powerful antisocial personality disorder, where he basically acts without thinking. Where he is operating like a jerk, . . . meaning completely oblivious to rules, to the rights of other people. He does what he wants. He does not obey laws and he has no restraint, period." Malinek said there is no evidence

defendant is a sexual sadist.

Malinek tested defendant using both the Static-99-R and the Static-2002-R. According to the Static-99-R, defendant had a moderate high risk of reoffending. However, when looking at the group into which defendant fit, only one in five or one in four would reoffend within five years. Defendant's score in the Static-2002-R, puts him in the moderate range, with less than 20 percent chance of reoffending within five years.

Brian Abbott is a licensed clinical psychologist. He was retained by the defense to conduct a psychological evaluation of defendant. Abbott said defendant has a personality disorder, not otherwise specified, with narcissistic and antisocial traits, but concluded that condition does not predispose defendant to commit sexually violent offenses. Abbott found defendant did not qualify as an SVP.

Abbott used the Static-99-R test, which Abbott stated is the most reliable of the available tests, and reviewed the results of the district attorney's evaluators. He said the Static-2002-R "essentially duplicates the Static-99R." He did not use a clinical adjusted actuarial approach because, research (including his own) indicates such an approach is not scientifically defensible. Abbott concluded there was approximately a six percent chance defendant would reoffend within five years if released.

II

DISCUSSION

Pursuant to the SVPA, an individual who has been convicted of committing a sexually violent offense against one or more victims and who has a mental disorder that makes him a danger to the safety of others because the disorder makes him likely to engage in further sexually violent criminal behavior, may be committed indefinitely to the DSH. (§ 6600.) The SVPA's purpose """is to identify persons who have certain diagnosed mental disorders that make them likely to engage in acts of sexual violence and to confine [them] for treatment of 'their disorders only as long as the disorders persist and not for any punitive purposes.' [Citation.]" [Citation.]' [Citation.]" *People v. Dean*

(2009) 174 Cal.App.4th 186, 191.) The petition alleged the qualifying offense in this matter was the attack on Julie M. The jury found defendant qualified as an SVP. The court then committed defendant to the DSH for an indefinite period of time. Defendant appeals, alleging a number of constitutional and statutory errors require reversal.

A. *Admission of Hearsay Evidence at Trial*

Prior to trial, the district attorney filed a motion in limine to admit pursuant to section 6600(a)(3) and Evidence Code sections 1271 and 1280 a number of exhibits containing hearsay.[2] The court did not rule on the motion at that time, stating the issue would be addressed during trial on an item-by-item basis. After the People rested, the district attorney moved the above documents into evidence.

Defendant contends the trial court admitted "a vast amount of inadmissible and highly prejudicial written hearsay"[3] (capitalization omitted) at trial, violating his due process right to a fair trial. Documents admitted into evidence, including probation reports, mental health evaluations, parole revocation documentation, and our appellate decision in the appeal from one of defendant's qualifying prior convictions, contained hearsay. Related to this argument, defendant asserts that if we find the issue was not preserved, based upon trial counsel's failure to adequately object, then the judgment must still be reversed because counsel rendered ineffective assistance.

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[2] The district attorney did not introduce evidence of the foundational requirements of Evidence Code sections 1271 (writing made in regular course of business, at or near the time of the event, custodian testimony to document's identity and mode of preparation, and the sources of information and method of preparation indicate document is trustworthy) or 1280 (writing made by public employee in scope of the employee's duty, at or near time of event, and sources and method of preparation indicate trustworthiness).

[3] "'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter asserted." (Evid. Code, § 1200, subd. (a).)

Hearsay evidence is inadmissible except as provided by law. (Evid. Code, § 1200, subd. (b).) Multiple hearsay is admissible if each level of hearsay "meets the requirements of an exception to the hearsay rule." (Evid. Code, § 1201.) "[A] trial court's decision to admit or exclude a hearsay statement . . . will not be disturbed on appeal absent a showing of abuse of discretion. [Citation.]" (*People v. Jones* (2013) 57 Cal.4th 899, 956.) As a general rule, the erroneous admission of hearsay evidence will not result in a reversal unless it is reasonably probable the defendant would have received a more favorable result had the evidence not been admitted. (*Ibid*, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) When admission of inadmissible evidence has resulted in a denial of due process under the federal Constitution, however, the harmless beyond a reasonable doubt reversible error standard of *Chapman v. California* (1967) 386 U.S. 18 applies. (*People v. Carlin* (2007) 150 Cal.App.4th 322, 344.)

1. *Section 6600's Limited Hearsay Exception in SVP Cases*

In section 6600, the Legislature provided a limited exception to the hearsay rule in SVP proceedings. "Conviction of one or more of the crimes enumerated in this section shall constitute evidence that may support a court or jury determination that a person is a sexually violent predator, but shall not be the sole basis for the determination. The existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, *may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of State Hospitals*." (§ 6600(a)(3), italics added.) The exception was created so victims of sexually violent offenses would not have to relive the offenses when the state seeks to commit the offender as a SVP, usually many years after the incident. (*People v. Otto* (2001) 26 Cal.4th 200, 208.) The fact that SVP proceedings generally take place years after a qualifying conviction, increasing the possibility that the victim in the underlying

conviction may not be available to testify, also played into the creation of this limited hearsay exception. (*Ibid*.)

Two issues were presented in *People v. Otto, supra,* 26 Cal.4th 200: whether section 6600(a)(3) authorized the admission of multiple hearsay not authorized by any other statutory provision, and whether admission of multiple hearsay violated due process. (*People v. Otto, supra*, 26 Cal.4th at p. 203.) The court held section 6600(a)(3) authorized the use of multiple hearsay (*People v.* Otto, *supra*, 26 Cal.4th at p. 208), and concluded the admission of multiple hearsay in the form of the presentence report in the underlying case and containing the police report therein did not violate due process (*id*. at pp. 209-215).

The court acknowledged an SVP's right to due process in an SVP proceeding. (*People v. Otto, supra,* 26 Cal.4th at p. 209.) In determining the amount of process due in an SVP proceeding, the court considered four factors: "(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail; and (4) the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official. [Citation.]" (*Id*. at p. 210.) Acknowledging due process required the victim's statements contained in the documentary evidence "must contain special indicia of reliability" under the first factor (*ibid.*), the court found that requirement was met because Otto had pled no contest to the offense to which the statements related. (*Id*. at p. 211.) In doing so, he stated the police reports contained the factual basis for his plea. (*Ibid.*) The court also noted the defendant had an opportunity in the underlying case to challenge the accuracy of the presentence report. (*Id* at p. 212.)

Additionally, the court found the risk of an erroneous deprivation of the defendant's interest in the SVP proceeding was diminished by his ability to cross-examine the prosecution witnesses who testified and to present his own expert witnesses (*People v. Otto*, *supra*, 26 Cal.4th at p. 214), obligating the government to require victims to testify would adversely impact the government's interest in protecting the public from those who are dangerous as the result of mental illness (*id.* at pp. 214-215), and the admission of hearsay evidence does not impede upon an SVP's right to be informed of the grounds for the proceeding or the SVP's ability to present his case (*id.* at p. 215).

The defendant in *People v. Carlin*, *supra*, 150 Cal.App.4th 322, also asserted a due process challenge to multiple hearsay purportedly admitted pursuant to section 6600(a)(3). There, the contested hearsay statements of a victim were made nine years *after* the defendant had been convicted and sentenced for molesting the victim who was 10 years old at the time of the molestation in 1990. (*People v. Carlin*, *supra*, 150 Cal.App.4th at p. 336.) The contested hearsay statement contained details of the incident that not only had not been revealed before, but were also inconsistent with previous statements by the victim. (*Id.* at pp. 336-337.)

The appellate court concluded the mere use of postconviction evidence is not contrary to the plain language of section 6600(a)(3). (*People v. Carlin*, *supra*, 150 Cal.App.4th at p. 339.) After all, the statute specifically permits state hospital reports to be used to show the existence of prior convictions and "[t]he details underlying the commission of an offense that led to a prior conviction. . . ." (§ 6600, subd. (a)(3).) However, the *Carlin* court found the statements made almost a decade after the fact did not contain the indicia of reliability required in a due process analysis. (*People v. Carlin*, 150 Cal.4th at pp. 340-341.) "Here, the circumstances surrounding the 2000 and 2001 statements do not support their reliability. The statements were not spontaneous, are inconsistent with [the victim's] 1991 statements, and have not been corroborated. Additionally, the statements were not made in close proximity to the crime and were

elicited as part of the People's SVP investigation." (*Id*. at p. 341, fn. omitted.) Moreover, the court noted the *Otto* court held "'[t]he most critical factor demonstrating the reliability of the victim hearsay statements'" is the fact that the defendant was convicted of the crimes described in the victim's statements, which generally meant the SVP either admitted guilt in a plea or the facts were found true at trial. (*Ibid*.) That significant corroborating factor was not present in *Carlin*, where the victim's new statements were made 10 years after Carlin's conviction and varied greatly from the victim's statements made at the time of the incident and trial. (*Ibid*.) Because the reliability of the recent statements was lacking, the court found their admission violated Carlin's right to due process. (*Id*. at p. 342.) Thus, even though the statements met the facial requirements of section 6600(a)(3), their admission violated due process.

Out of court statements relied upon by an expert in forming his or her opinion are not generally considered hearsay because they are not admitted for the truth of the matter asserted. Rather, they are considered only for the purpose of assessing the expert's opinion. (*People v. Dean*, *supra*, 174 Cal.App.4th at p. 197.) That being said, if an expert's "detailed explanation" of the inadmissible hearsay relied upon actually brings inadmissible hearsay evidence before the jury, the defendant may be prejudiced. (*Ibid*.)

In *Dean*, the defendant contended the trial court erroneously permitted the district attorney's expert to testify to inadmissible hearsay. (*People v. Dean*, *supra*, 174 Cal.App.4th at p. 190.) The expert testified to the facts of the qualifying convictions, "the fact that defendant was convicted of and/or pled guilty to the qualifying offenses," and to information obtained from records at the state hospital. (*Id*. at p. 192.)

In connection with an expert's testimony concerning information gleaned from hospital records, the court reiterated that generally an expert may base his or her opinion on information made known to the expert, including what would otherwise qualify as inadmissible hearsay. (*People v. Dean*, *supra*, 174 Cal.App.4th at p. 196.) However, "'while an expert may rely on inadmissible hearsay in forming his or her

opinion [citation], and may state on direct examination the matters on which he or she relied, the expert may not testify as to the details of those matters if they are otherwise admissible.' [Citation.]" (*Ibid*.) The reason for this rule is that "the jury might improperly consider such testimony as independent proof of the facts described in the reports and the adverse party is denied the opportunity to cross-examine the person who made the statements. [Citations.]" (*Id*. at pp. 196-197.)

Addressing the expert's testimony concerning the underlying qualifying convictions, the court noted section 6600(a)(3) permits documentary hearsay evidence of the details of the commission of a qualifying offense and that pursuant to that section, the trial court admitted "*redacted* portions of two probation reports which contained the multiple-level hearsay statements of the respective victims." (*People v. Dean*, *supra*, 174 Cal.App.4th at p. 194, italics added.) Consequently, the court held the expert's reliance on this evidence was proper because "[a]ll the facts were provided by the victims of the qualifying offenses and were therefore admissible into evidence under section 6600, subdivision (a)(3)." (*Id.* at p. 195.)

That was not the case in regard to one of the expert's testimony concerning information gleaned from her review of state hospital records. Dr. Starr testified the records showed the defendant began committing crimes when he was 12 or 13 years old. According to Starr, the records further showed the defendant received sexual gratification when he committed a robbery, he used marijuana, PCP, and methamphetamine, he did not participate in treatment while in the hospital, he violated boundary rules with female staff, and he apparently used illicit drugs while in the hospital. Starr further testified to the defendant's score on a psychopathy test administered at the hospital. Additionally, Starr reviewed the defendant's records from the Department of Corrections and Rehabilitation. She stated those records showed he had been in prison since 1983, and also spent time in various juvenile facilities, the California Youth Authority (CYA), and mental hospitals. The records also showed the defendant set a school on fire, assaulted a

neighbor with a BB gun, and threw rocks at vehicles as a juvenile. She stated he has a history of escaping from a juvenile facility and from a psychiatric hospital, and the record stated the defendant committed rape, sodomy, and oral copulation while at CYA. In prison, the defendant spoke of his plan to kill six people. The records also stated the defendant engaged in nonconsentual sex with at least three victims while in custody. (*People v. Dean*, *supra*, 174 Cal.App.4th at p. 198.)

The *Dean* court found the trial court erred in permitting Starr to testify to the specifics of the entries in the records she reviewed. (*People v. Dean*, *supra*, 174 Cal.App.4th at p. 200.) The court found the entries testified to by Starr were highly inflammatory and their reliability was questionable. The court concluded that using the doctor's review of the records to support her opinion presented a risk the jury would impermissibly use the information, i.e., the jury would use the evidence as proof of the matters asserted in the records. (*Id.* at p. 201.) The court then reiterated, "'The rule which allows an expert to state the reasons upon which his opinion is based may not be used as a vehicle to bring before the jury incompetent evidence. [Citation.] . . . [I]t [is] proper to prohibit doctors . . . from detailing the contents of reports they . . . relied upon. [Citation.]'" (*Ibid*.)

2. *Defense Objections and Forfeiture*

The Attorney General contends defendant forfeited the hearsay issue because after the district attorney redacted portions of a number of exhibits, defense counsel stipulated the documents did not contain inadmissible hearsay. We disagree.

In addressing the admissibility of exhibit 1, the 35-page 1992 Laguna Beach police report, defense counsel objected to its admission, although he did not object to it containing hearsay. Rather, he noted that while experts relied on part of it, it contained a large amount of speculation and its admission would permit the jury to consider information that was not relied on by the experts. The district attorney argued police reports are admissible under *People v. Angulo* (2005) 129 Cal.App.4th 1349. The

court accepted the district attorney's argument and relied on the *Angulo* decision in admitting the police report into evidence.

The district attorney argued Viglione's initial mental health evaluation report was admissible under section 6600(a)(3). Defense counsel argued the report contained "unreliable and unsubstantiated hearsay." When pushed by the court to state what portion(s) of the report counsel believed was inadmissible, counsel stated it was everything but Viglione's ultimate conclusion that defendant met the criteria as an SVP. Counsel stated he had no objection to the first page of Viglione's report being admitted into evidence. During the discussion on the admissibility of exhibit 2, the court stated its concern about untested hearsay and reiterated that hearsay from "other sources"—presumably from sources other than the victims—would not be admissible, citing *People v. Dean, supra,* 174 Cal.App.4th 186. The court then provided the parties an opportunity to redact those portions of the report that would violate the holding of *Dean*. The court concluded that portions of Viglione's report that were "clearly improper," while recognizing the report was "duplicative of his testimony." The court concluded exhibit 2 was admissible with appropriate redactions.

The court, apparently considering defendant's previous objections, directed the district attorney to redact exhibit 3, another of Viglione's reports. Defendant objected to exhibits 4 and 5, updated reports by Viglione, on the same grounds he raised earlier and the court directed the district attorney to redact the report.

Defendant's unsuccessful objection to exhibit 6, the packet containing the felony complaint, information, minute orders from the sentencing dates in the Julie M. matter, was that certain charges that appear in these documents were reversed on appeal and it would be confusing for the jury to have that information in front of them.

Defendant objected to the admission of exhibit 7, the probation report in the Julie M. matter, because it contained multiple levels of hearsay. The court stated the jury was intelligent enough to understand defendant was convicted of a number of counts in

that case and that this court reversed some of the counts. As to our opinion in the Julie M. matter, exhibit 8, the court agreed that some portions of the opinion should be redacted. However, when defense counsel was asked for his objections to this document, counsel responded that he did not "have a strong objection." He did object to the legal analysis contained in the opinion. The court reiterated the jury was very bright, presumably meaning it would not prejudice the defendant to have the opinion admitted into evidence.

Defendant objected to exhibit 9, the police report in the Shirley M. matter on the "[s]ame objection as to the first [police] report. . . ." The district attorney moved exhibit 11, a parole charge sheet, into evidence because it was relied upon by the experts, and claimed it was admissible under *Angulo*. Defendant's objection was that it contained a number of charges that were not sustained and which the jury did not hear about in testimony. Exhibit 11 was redacted and admitted. Exhibit 13 was another parole charge sheet. It alleged defendant's failure to register as a sex offender and that defendant threatened a previous victim. Defendant did not object to admission of the document.

Defendant also objected to Teofilo's reports, exhibits 15 and 16, on the same grounds he objected to Viglione's initial report. As to exhibit 17, another of Teofilo's reports, the court instructed the district attorney to make appropriate redactions.

Defendant objected to exhibit 18, the information, abstract of judgment, and sentencing minute order in the Shirley M. matter. He did not, however, state any grounds. Defense counsel objected to the probation report in the burglary matter, exhibit 19, and added new grounds. In addition to claiming the probation report was more prejudicial than probative (Evid. Code, § 352), defense counsel pointed out that the burglary conviction "is not a qualifying conviction." The court stated it would be admitted, but directed the district attorney to "redact as appropriate."

After the district attorney made the redactions, the court stated that what had been done was the removal of the type hearsay held improper in *People v. Dean*,

supra, 174 Cal.App.4th 186. The court understood the defense still objected to the admission of the documentary evidence, "but to the extent the general introduction is allowable, [defense counsel] stipulate[s] to the redactions, by excluding the inadmissible hearsay within." Although defendant did not specifically object that each exhibit contained hearsay not made admissible by the limited exception in section 6600(a)(3), the court was aware of the statute, cases applying the statute, and the issue of whether the statute applied to each exhibit offered. Moreover, the fact that the court admitted exhibit 19 into evidence over defendant's objection when the probation report was *not* for a qualifying offense as specified in section 6600(a)(3)), supports our decision to address the merits of the issue rather than hold defendant's objections were insufficient and leave the issue for another day in a habeas proceeding alleging ineffective assistance of counsel. Furthermore, the district attorney was fully aware the issue of admissibility involved the proper application of section 6600(a)(3).

3. *Analysis*

As noted above, section 6600(a)(3) created a limited exception to the hearsay rule. This limited exception applies only to documentary evidence that tends to prove the defendant suffered the requisite conviction(s) for a sexually violent offense and/or the details of the offense that led to the conviction, including the existence of a predatory relationship with the victim. (§ 6600(a)(3).) Our review of the exhibits admitted into evidence reveals that unredacted portions of the exhibits did not fall within the limited hearsay exception created by section 6600(a)(3).[4]

As previously stated, exhibit 1 was lengthy police report from the 1992 burglary at a motel in Laguna Beach. The report had nothing to do with the qualifying sexually violent offense(s) that occurred years earlier. It did not tend to prove defendant

[4] No foundation for the admission of documents pursuant to Evidemce Code section 1271 [business record] or 1280 [public record] was shown.

had a conviction for a qualifying sexually violent offense or tend to show the details of such a conviction. Its admission was simply not authorized by section 6600(a)(3).

Relatively few lines were redacted from exhibit 2, Viglione's section 6600 May 2010 evaluation of defendant. The portion of Viglione's report addressing the facts underlying defendant's convictions in the Julie M. and Shirley M. matters may have been admissible under section 6600(a)(3)—documents admissible to prove requisite conviction and its details include, *but are not limited to*, "evaluations by State Department of State Hospitals."[5] However, of the 21 pages of the report, details of defendant's convictions for the sexually violent offenses involving Julie M. and Shirley M. and the facts in those matters were contained in but approximately six pages. The remainder of the report consists of detailing other aspects of defendant's life and Viglione's evaluation of defendant. "However, 'a witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into "independent proof" of any fact.' ([*People v.*] *Gardeley* [(1996)] 14 Cal.4th [605,] 619.)" (*People v. Miller* (2014) 231 Cal.App.4th 1301, 1310.) Section 6600(a)(3) did not authorize the admission of the vast majority of Viglione's report and neither did Viglione's testimony.

Viglione's July 2011 evaluation (exhibit 3) does not set forth any facts from the underlying requisite convictions and was not admissible to any extent pursuant to section 6600(a)(3). Of the five-page updated report, only two lines contain any reference to the underlying offenses. At a minimum, the admission of the remainder of the report into evidence was not authorized by section 6600(a)(3). The same holds true for Viglione's five-page June 2012 updated evaluation. Viglione's three-page November 2012 update (exhibit 5) made no reference to the facts underlying defendant's convictions in the Julie M. and Shirley M. matters and was not admissible under section 6600(a)(3).

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[5] Viglione's report was done under the auspices of the Department of Mental Health.

Exhibit 7, the 13-page probation sentencing report in the Julie M. matter is the type of document specifically listed in section 6600(a)(3) as being admissible to prove the conviction for an underlying conviction for sexually violent offenses and the details surrounding the commission of such offenses. The probation report contains a section setting forth the "circumstances of the offense." (Capitalization omitted.) Although six paragraphs were redacted from the probation report, the sections on defendant's prior record, his social history, and the probation officer's evaluation were not. These sections were not admissible under section 6600(a)(3), as they neither set forth the existence of defendant's qualifying conviction nor set forth the details of the conviction.

Exhibit 8, our opinion in defendant's appeal in the Julie M. matter was admitted without redaction. The opinion was part of the record of conviction in that matter. (*People v. Woodell* (1998) 17 Cal.4th 448, 457.) As it contained a recitation of the facts introduced at trial, that portion of the opinion satisfied section 6600(a)(3). The mere fact that some portion of a document satisfies section 6600(a)(3) does not, however, mean the document is admissible in its entirety. In other words, section 6600(a)(3) authorizes the admission into evidence of only those portions of the document that meet section 6600(a)(3)'s requirements.

Our discussion of legal issues raised on appeal—other crimes evidence (Evid. Code, § 1101)—that resulted in the reversal of defendant's rape conviction and reduction of defendant's conviction from child molestation with force to child molestation without force did not meet the test for admission under section 6600(a)(3). Neither was it relevant to any issue to be decided by the jury.

The police report from the Shirley M. incident, exhibit 9, was admissible to the extent it contained her statements about being raped by defendant. Defendant appears to concede other portions of the document were also admissible as part of a public record, to the extent it contained firsthand observations by police officers. We see nothing in the

remaining portions of the police report that we conclude could have prejudiced defendant.

One of the charges and five paragraphs were redacted from exhibit 11, the April 24, 1990 parole charge sheet. The remainder of the charge sheet was admitted into evidence. There was nothing in the remaining pages of the document having to do with a qualifying conviction or the details surrounding such a conviction. The court erred in admitting exhibit 11 into evidence.

As with Viglione's written evaluations of defendant, the written evaluations of Teofilo were admitted into evidence as exhibits 15 through 17. Other than those portions of the reports setting forth the fact of defendant's qualifying prior conviction(s), and the facts surrounding the underlying incident(s), the remainder of the reports were not admissible pursuant to section 6600(a)(3).

Exhibit 19, the probation report in the 1992 burglary matter was not authorized by section 6600(a)(3) either. Except for the reference to defendant's convictions in the Julie M. and Shirley M. matters, the probation report dealt with the facts surrounding a conviction for burglary, not a conviction for a qualifying offense as required by statute.

Neither did section 6600(a)(3) authorize admission into evidence of exhibit 20, the 1990 parole summary of revocation hearing and decision, which did not contain information about or pertain to a conviction for a qualifying offense. The narrative in the document was redacted, essentially leaving only the fact that the revocation was based on, and good cause was shown that, defendant changed his residence without permission, committed a sexual battery, a battery, and had access to firearms, ammunition, and knives.

Lastly, exhibit 24, the police report from 1990, and pertaining to the incidents with his ex-wife and his daughter was not admissible into evidence pursuant to section 6600(a)(3). The damning portions of the police report—those referencing

statements to the officer about defendant's actions with his wife and daughter—were hearsay.

The Attorney General argues the court properly exercised its discretion in admitting the documents because section 6600(a)(3) specifically sanctions admission of crime reports, conviction records, and mental health evaluations. While such documents are referred in section 6600(a)(3), those documents are only admissible to the extent they demonstrate the existence of a prior qualifying conviction and/or "[t]he details underlying the commission of an offense" that lead to such a conviction. (§ 6600(a)(3).) The statute does not purport to permit the admission of documents that do not meet the requirements set forth therein.

4. *Prejudice*

As a general rule, prejudice from the erroneous admission of evidence is governed under the standard set forth in *People v. Watson*, *supra*, 46 Cal.2d at page 836, "'after an examination of the entire cause, including the evidence,'" reversal is required only if the court is of the opinion "that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Cahill* (1993) 5 Cal.4th 478, 509-510.) We conclude the error in admitting the substantial amount of inadmissible documentary evidence was prejudicial.

The properly admitted evidence against defendant was substantial to be sure. And much of the inadmissible documentary evidence was cumulative to other, properly admitted evidence. For example, material in the various evaluations that was not admissible pursuant to section 6600(a)(3) was already in front of the jury as the result of the testimony of the experts. However, the large amount of inadmissible documentary evidence admitted in this matter, which included documents critical of defendant and containing no admissible evidence, would tend to lead the jury to believe the evidence against defendant was absolutely overwhelming. Moreover, admitting into evidence the inadmissible hearsay relied upon by the psychologists presented the same problem as if

the experts had introduced the inadmissible hearsay through their own testimony. (See *People v. Dean*, *supra*, 174 Cal.App.4th 186.)

In addition, while a jury would ordinarily be instructed concerning the limited purpose for which out-of-court statements were accepted into evidence in connection with an expert's testimony, i.e., for a nonhearsay purpose (see CALCRIM No. 300 [limited purpose of evidence generally]; CALCRIM No. 360 [limited admissibility of statements made to expert]), in this case the massive amount of inadmissible documentary material was admitted for the truth of the matters asserted therein and therefore were not accompanied by any such limiting instruction. This included the probation report for defendant's burglary conviction (exhibit 19), with only a passing reference to the Julie M. and Shirley M. matters. Furthermore, admission of the analysis contained in our opinion in defendant's appeal in the Julie W. matter informed the jury that defendant had been convicted of raping Julie M., but the charge was reversed based on evidentiary error, and defendant's conviction for forcible child molestation was reduced to child molestation without force for the same reason.

We cannot say with certainty that without the mountain of inadmissible documentary evidence admitted at trial, the jury would have found defendant to be an SVP, although there would have been sufficient admissible evidence to support the finding. Even with the admission of the large amount of inadmissible documentary evidence, the jury experienced difficulty in reaching its verdict, as evidenced by a note sent to the court by one of the jurors about the heated nature of the deliberations. We therefore reverse the finding that defendant is an SVP and the judgment committing him as an SVP. To conclude the error was harmless would be to stretch the concept beyond its snapping point.

Because we conclude defendant was prejudiced by admission of a vast amount of inadmissible hearsay and reverse, we need not decide whether reversal is also required because the district attorney called defendant as a witness in her case-in-chief.

That issue is now moot and may be raised in the superior court should the district attorney again call defendant as a witness. Additionally, the issue of whether amendments to the SVPA have rendered it unconstitutional should be raised in the first instance in the trial court.

III

DISPOSITION

The judgment committing defendant as an SVP is reversed. The matter is remanded to the superior court for retrial.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.